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7 UNITED STATES OF AMERICA,
8 Plaintiff,
9 -vs-
10 WAYDE LYNN KURT,
11 Movant.

Nos. 2:10-CR-00114-WFN-1
2:11-CR-00161-WFN-1

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ORDER DENYING MOVANT'S
§ 2255 MOTION

Before the Court is pro se Movant's Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255, ECF Nos. 209 (2:10-CR-00114-WFN) and 50 (2:11-CR-00161-WFN), to which the Government has not responded. Movant seeks to vacate and set aside the judgments and sentences imposed in both of the above captioned cause numbers.

PROCEDURAL HISTORY

Under cause number 2:10-CR-00114-WFN-1, Movant was charged with being a felon in possession of a firearm. Movant proceeded to trial and the jury returned a guilty verdict. The Court sentenced Movant to 120 months imprisonment. At sentencing, the Court increased Movant's base offense level by four levels for possessing a firearm in connection with another felony and two levels for obstruction of justice.

On direct appeal, Movant argued that the Court erred by (1) refusing to give entrapment instructions, (2) excluding book excerpts and photographs, and (3) applying the two sentencing enhancements. A panel of the Ninth Circuit affirmed the Court's judgment in an unpublished opinion. *United States v. Kurt*, 532 Fed. Appx. 723 (9th Cir. 2013). The Ninth Circuit found that Movant did not present sufficient evidence of

1 inducement to warrant the entrapment instructions. *Id.* at 724. The Ninth Circuit also
 2 found no error in the Court's evidentiary rulings and sentencing enhancements. *Id.* at
 3 725-27. Judge Tashima dissented, concluding that the Court should have instructed the
 4 jury on the entrapment defense. Judge Tashima equated the Court's failure to give
 5 entrapment instructions to "enter[ing] a directed verdict for the government." *Id.* at 728
 6 (Tashima, J., dissenting).

7 In cause number 2:11-CR-00161-WFN, Movant was charged with Aggravated
 8 Identity Theft (Count 1), Unlawful Production of an Identification Card (Counts 2 and 4),
 9 Unlawful Possession of an Identification Card (Counts 3 and 5), and False Statement
 10 (Count 6). Movant pled guilty to Counts 2 and 6 of the Indictment. The Court sentenced
 11 Movant to 36 months imprisonment for each count, to be served concurrent to one another,
 12 but consecutive to the 120 month sentence imposed in 2:10-CR-00114-WFN. Movant
 13 appealed from the judgment and conviction, but the parties later stipulated to dismiss the
 14 appeal.

15 On April 14, 2014, Movant filed the current Motion alleging ineffective assistance
 16 of counsel.

17 **APPLICABLE LAW**

18 The Sixth Amendment provides that an accused in a criminal prosecution has a right
 19 to the assistance of counsel. U.S. CONST. amend. VI. To show a deprivation of the Sixth
 20 Amendment right to counsel, a movant must establish both that his lawyer's performance
 21 was deficient and that the deficient performance prejudiced his defense. *Strickland v.*
22 Washington, 466 U.S. 668, 687 (1984).

23 A "deficient" performance is one that is not reasonably effective, where an objective
 24 standard guides judgments of reasonableness. *Id.* at 687-88. To satisfy *Strickland*'s first
 25 prong, the acts or omissions must fall "outside the wide range of professionally competent
 26 assistance." *Id.* at 690. That is, the defendant must show "that counsel made errors so
 27 serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the
 28 Sixth Amendment." *Id.* at 687. There is a strong presumption that counsel's conduct falls
 within the range of reasonable professional assistance. *Id.* at 689.

A deficient performance prejudices a defense if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* *Strickland*'s second prong thus "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. A Court need not address the prejudice prong if counsel's performance was not deficient. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 672 (9th Cir. 2002).

DISCUSSION

Movant contends that his trial counsel was ineffective as counsel failed to (1) correct the Court's misapprehension of certain facts on which the Court based its decision not to instruct the jury on entrapment, (2) raise "fear" as the Government's inducement of entrapment, (3) appeal a prior conviction used at sentencing that was constitutionally "infirm and void," and (4) object to a special condition of supervised release requiring Movant to undergo a mental health evaluation.

1. Movant fails to show that counsel was ineffective by failing to correct the Court's misapprehension of certain facts on which the Court based its decision not to instruct the jury on entrapment.

Movant argues that defense counsel was ineffective during the jury instruction conference because counsel did not "correct" the Court's erroneous understanding of the facts of the case and because counsel did not object to the "directed verdict" that resulted from the Court's decision not to instruct the jury on entrapment. Movant argues that defense counsel should have submitted a written brief challenging the Government's portrayal of, and the Court's misunderstanding of, the facts presented at the jury instruction conference.

Movant fails to show that defense counsel's performance was deficient. Defense counsel vigorously objected to the Court's decision not to give the entrapment instructions. At the jury instruction conference, counsel set forth all the facts that he believed justified

1 the instructions. Defense counsel argued that David Udseth, the Government informant,
 2 encouraged Movant to obtain weapons, specifically a reloader. (Tr. at 861.) (Udseth
 3 himself denied that he encouraged Movant to obtain a reloader (Tr. at 215) and Movant
 4 testified that Udseth did not threaten or coerce him into obtaining weapons (Tr. at
 5 790-71)). Counsel also argued that Movant did not obtain any weapons until after
 6 discussions with Udseth in August 2010. (Tr. at 862.) (A significant amount of evidence
 7 suggested that Movant possessed some firearms prior to August 2010.) Counsel further
 8 argued that the Court must consider entrapment in the "context" of Movant joining, and
 9 later withdrawing from, the Vanguard Kindred, "the assault on Anthony [Johnson]," and
 10 Movant's relationship with Udseth. (Tr. at 862-63.)

11 Although Movant frames this issue as a failure on the part of defense counsel,
 12 Movant is essentially challenging the Court's decision not to instruct the jury on
 13 entrapment. On direct appeal, the Ninth Circuit concluded that the Court did abuse its
 14 discretion in finding that no reasonable jury could conclude that Movant was entrapped.
 15 The Ninth Circuit found that "[Movant] provided no evidence of government pressure or
 16 incentives that would prompt a law-abiding person to commit the offense." *Kurt*, 532 Fed.
 17 Appx. at 725. The Ninth Circuit did not question or criticize the Court's understanding of
 18 the facts presented by counsel at the jury instruction conference. Under such
 19 circumstances, defense counsel did not act unreasonably by failing to "correct" the Court's
 20 understanding of the facts or by failing to request leave to file a written brief. Movant fails
 21 to overcome the presumption that defense counsel acted "within the wide range of
 22 professionally competent assistance." *Strickland*, 466 U.S. at 690.

23 **2. Movant fails to show that defense counsel was ineffective by failing to argue
 24 that Movant's fear of Udseth constituted inducement for purposes of entrapment.**

25 Movant argues that defense counsel was ineffective because counsel did not argue
 26 that Movant's fear for his friends and family constituted inducement and provided grounds
 27 for entrapment instructions. Movant argues he obtained weapons at the behest of Udseth
 28 out of fear for the safety of Anthony Johnson (Movant's "adopted homeless person"). ECF

1 No. 209-1 at 12 (2:10-CR-00114-WFN); ECF No. 51 at 12. Movant claims that defense
 2 counsel could have established fear as the inducement for entrapment by presenting
 3 evidence regarding Udseth's affiliation with white supremacy groups and association with
 4 Keegan Van Tuyl, a white supremacy group leader. Movant claims that defense counsel
 5 was ineffective because counsel failed to impeach Udseth on these grounds. Movant also
 6 claims that defense counsel was ineffective by failing to subpoena or present evidence
 7 including recorded phone calls between Van Tuyl and Udseth and newspaper articles
 8 about Van Tuyl.

9 The Court's finds Movant's argument flawed because fear of a government agent is
 10 "insufficient to entitle [a defendant] to an instruction on entrapment." *United States*
 11 *v. Saturley*, 890 F.2d 420, at *1 (9th Cir. 1989) (unpublished); *see also id.* (noting that
 12 "such fear . . . would lead to a defense of duress rather than entrapment."). Because fear
 13 of a government agent is insufficient to show inducement for purposes of entrap-
 14 ment, defense counsel was not ineffective for failing to pursue the strategy now advanced
 15 by Movant. Movant also fails to show that defense counsel's impeachment of Udseth
 16 or presentation of evidence rises to the level of deficient performance. *See Reynoso*
 17 *v. Giurbino*, 462 F.3d 1099, 1113 (9th Cir. 2006) ("[M]atters such as counsel's approach
 18 to impeachment are often viewed as tactical decisions, and such decisions do not
 19 constitute deficient conduct simply because there are better options.") (internal quotation
 20 omitted). Movant fails to overcome the presumption that defense counsel acted "within
 21 the wide range of professionally competent assistance" by failing to argue that Movant's
 22 fear of Udseth constituted inducement for purposes of entrapment. *Strickland*, 466 U.S.
 23 at 690.

24 **3. Movant fails to show that counsel was ineffective by failing to appeal the**
Court's use of a prior conviction to calculate Movant's criminal history.

25 Movant argues that defense counsel was ineffective because counsel failed to appeal
 26 the Court's use of a prior conviction to calculate Movant's criminal history because the
 27 conviction was constitutionally infirm and presumptively void. Movant is referring to a

1 2004 conviction for Theft of Government Property, for which the Court sentenced Movant
 2 to 18 months imprisonment. In that case, Movant was convicted for theft of a vehicle
 3 tracking device placed on his vehicle by United States Secret Service agents. The Ninth
 4 Circuit affirmed Movant's conviction. *United States v. Kurt*, 143 Fed. Appx. 848 (9th Cir.
 5 2005).

6 At sentencing, defense counsel argued that Movant's Theft of Government Property
 7 conviction was "constitutionally infirm and presumptively void" because the Government
 8 "abandoned" the tracking device by placing it on Movant's vehicle. *See* ECF No. 168 at
 9 14-15. The Court found this argument meritless and assigned the conviction three criminal
 10 history points as recommended in the Presentence Investigation Report (PSR). Defense
 11 counsel did not appeal the Court's ruling on this issue. In the pending motion, Movant
 12 presents the exact same argument and claims that counsel was ineffective for failing to
 13 appeal the issue.

14 "Claims of ineffective assistance of appellate counsel are reviewed according to the
 15 [same standard that applies to trial counsel]." *Turner v. Calderon*, 281 F.3d 851, 872 (9th
 16 Cir. 2002). "To be constitutionally effective, counsel need not appeal every possible
 17 question of law." *Id.* (internal quotation marks omitted). Appellate counsel need not
 18 appeal issues that have no merit or issues that are clearly untenable. *Id.*

19 Movant fails to show that defense counsel was ineffective by failing to appeal the
 20 Court's refusal to discount the criminal history points assigned to Movant's 2004 Theft of
 21 Government Property. Given that Movant's 2004 conviction was upheld on appeal, the
 22 argument that the conviction is "constitutionally infirm and presumptively void" has no
 23 merit and is clearly untenable. Movant fails to overcome the presumption that defense
 24 counsel acted "within the wide range of professionally competent assistance" by not
 25 appealing this issue. *Strickland*, 466 U.S. at 690.

26 **4. Movant fails to show that defense counsel was ineffective by failing to object**
 27 **to the special condition of supervised release requiring Movant to participate in a**
 28 **mental health evaluation.**

1 The Court sentenced Defendant in both cases on May 15, 2012. In both cases, the
 2 Court imposed Special Condition 14, which requires Movant to "complete a mental health
 3 evaluation and follow any treatment recommendations of the evaluating professional
 4 [(subject to some exceptions)]." (ECF No. 178 at 4 (2:10-CR-00114-WFN); ECF No. 38
 5 at 4.) Movant argues that defense counsel was ineffective by failing to object to this
 6 special condition of release.

7 "A district court has broad discretion to impose supervised release conditions."
 8 *United States v. Lopez*, 258 F.3d 1053, 1056 (9th Cir. 2001). 18 U.S.C. § 3583(d)

9
 10 allows a court to impose any condition it considers to be appropriate so long
 11 as the condition is reasonably related to the factors set forth in § 3553,
 12 involves no greater deprivation of liberty than reasonably necessary to afford
 13 adequate deterrence to criminal conduct; to protect the public from further
 14 crimes of the defendant; to provide the defendant with needed educational or
 15 vocational training, medical care, or other correctional treatment in the most
 16 effective manner, and is consistent with any pertinent policy statements in the
 17 guidelines.

18 *Id.* at 1056-57 (internal quotation marks and footnote omitted).

19 "[A] condition requiring participation in a mental health program is a routine (albeit
 20 "special") condition of supervised release." *Id.* at 1056. The United States Sentencing
 21 Guidelines recommend that a special condition of mental health program be imposed "[i]f
 22 the court has reason to believe that the defendant is in need of psychological or psychiatric
 23 treatment." U.S.S.G. § 5D1.3(d)(5). Even in the absence of evidence that a defendant is
 24 mentally ill, the Court may still require a defendant to participate in a mental health
 25 evaluation when a defendant's underlying criminal conduct is of a "violent, fanatical and
 26 highly destructive nature." *United States v. Williams*, 52 Fed. Appx. 983, 985 (9th Cir.
 27 2002).

28 As detailed in the PSR, and as observed by the Court during trial, Movant has a
 29 twisted worldview and has no remorse for his actions. Movant has, at one time or another,
 30 planned to carry out a "final solution," kill the President of the United States, and engage

1 in acts of terrorism similar to the Oklahoma City bombing. Movant has a lengthy criminal
 2 history, mostly involving counterfeiting, but believes that he has done nothing illegal. *See*,
 3 *e.g.*, Tr. at 771 ("I don't think I did anything to harm anyone, ever."). Movant's prior
 4 periods of supervised release have been unsuccessful. A mental health evaluation may
 5 reveal that Movant has no psychological abnormalities or may suggest that Movant needs
 6 mental health treatment. Treatment may deter Movant from continuing to engage in
 7 criminal activities and help him understand right from wrong. A mental health evaluation
 8 and subsequent treatment may also protect the public from the various consequences of
 9 Movant's fanatical and destructive behavior. Defense counsel was not deficient by failing
 10 to object to this special condition of release because there were no grounds for objection.
 11 Special Condition 14 provides Movant with "needed . . . correctional treatment," 18 U.S.C.
 12 § 3553(a)(2), and involves no greater deprivation of liberty than is reasonably necessary to
 13 achieve these ends, *id.* § 3583(d).

14 **CERTIFICATE OF APPEALABILITY**

15 An appeal of this Order may not be taken unless this Court or a Circuit Judge
 16 issues a certificate of appealability, finding that "the applicant has made a substantial
 17 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires
 18 a showing that "reasonable jurists would find the district Court's assessment of the
 19 constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).
 20 Based on the Court's preceding analysis, the Court concludes jurists of reason would not
 21 find the Court's rulings debatable. Thus, a certificate of appealability should not issue.
 22 Accordingly,

23 **IT IS ORDERED** that:

24 1. Movant's Motion to Vacate, Set Aside, or Correct Sentence under 28
 25 U.S.C. § 2255, filed April 14, 2014, **ECF Nos. 209 (2:10-CR-00114-WFN) and 50**
 26 **(2:11-CR-00161-WFN)**, is **DENIED**.

27 2. Movant's Motion Requesting Court Records as an Indigent, filed April 14, 2014,
 28 **ECF Nos. 211 (2:10-CR-00114-WFN) and 53 (2:11-CR-00161-WFN)**, is **DENIED**.

1 Movant adequately cites to the record where appropriate. Movant fails to demonstrate
2 how any of the requested transcripts are pertinent to the issues raised in his § 2255 motion.

3 3. Movant's Motion Setting Hearing Date, filed April 14, 2014, ECF Nos. **212**
4 (**2:10-CR-00114-WFN**) and **54** (**2:11-CR-00161-WFN**), is **DENIED**.

5 The District Court Executive is directed to:

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- File this Order and provide copies to pro se Movant and to the United States Attorney in Spokane, Washington;
- Inform the Ninth Circuit Court of Appeals that if the Movant files a Notice of Appeal that a certificate of appealability is **DENIED**; and
- **CLOSE** the corresponding civil files, **2:14-CV-00099-WFN** and **2:14-CV-00100-WFN**.

12 **DATED** this 28th day of April, 2014.

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s/ Wm. Fremming Nielsen

WM. FREMMING NIELSEN
SENIOR UNITED STATES DISTRICT JUDGE